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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/935,297	08/22/2001	Dwayne Lacey	100 007 CIP	9672
25191	7590	05/24/2004		EXAMINER
BURR & BROWN				DEMILLE, DANTON D
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SYRACUSE, NY 13261-7068			ART UNIT	PAPER NUMBER
			3764	

DATE MAILED: 05/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/935,297	LACEY, DWAYNE
	Examiner Danton DeMille	Art Unit 3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 09 April 2004.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-4 and 6-33 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-4 and 6-33 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_

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## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**Claims 1-4, 6-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robbins et al. in view of Rabin et al. or Blachly.** Even though applicant claims priority to 09/335,714, the claims in the instant application are drawn to the new matter including the vibrator handle that was introduced for the first time on 8/22/2001. Therefore, the effective filing date for these claims is 8/22/2001. The invention disclosed in the patent to Robbins was known to others on 7/21/2000 more than one year before the filing date of the instant application.

Robbins teaches a head massaging device comprising a plurality of resilient fingers having the head receiving space and opening as claimed. The only difference between Robbins and the claimed invention is the provision of adding a vibrator to the devise of Robbins. There appears to be no unobviousness to add a vibrator to enhance any massage therapy applied to the scalp of the patient.

The Rabin device teaches providing a plurality of resilient fingers 12 wherein at the base of the fingers is mounted a vibrator. The vibrator sends vibrations down the fingers to the free ends of the fingers.

Blachly also teaches a device for massaging the scalp including resilient fingers 24 and a vibrator for stimulating the scalp of the patient.

Both Rabin and Blachly teach head massage devices with resilient fingers for massaging the scalp provided with vibrators to enhance the massage. It would have been obvious to one of ordinary skill in the art to modify Robbins to include a vibrator as taught by Rabin and Blachly to enhance the massaging effect on the scalp.

Regarding claims 15 and 30, the claimed transversely extending portion is merely the shape of the fingers as they exist near the handle. This would appear to be merely a design choice dependent on specific intended use. Robbins teaches "upon application of a force sufficient to cause bending, once bent by a user so as to be moved to another position or formed into another shape under a bending force, the flexible, metallic prongs or fingers 22, 24, 26 and 28 will stay in that shape." Clearly Robbins teaches the fingers can be bent into any desired configuration. Having a transversely extending portion adjacent the handle would appear to be just such a modification well within the realm of the artisan of ordinary skill that does not provide any unexpected results.

*Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --  
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 1, 2, 7, 15-17, 23, 26, 27, 29 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Rabin et al.** Rabin teaches a plurality of resilient fingers 12 and an electric vibrator including motor 28 including an eccentric weight. As shown in figure 8, the fingers form a head receiving space and opening as claimed.

**Claims 1-3, 7-10, 15-19, 23, 26-29 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Taylor.** Taylor teaches a plurality of resilient fingers 16 and an electric vibrator 14. As shown in figure 1, fingers 16 form the head receiving space and the opening as claimed. The fingers 16 comprise bending wire 45.

**Claims 1, 4, 6-8, 10, 13-17, 19, 22-27, 30-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Erickson in view of Rabin et al.** Erickson teaches a plurality of resilient fingers S and an electric vibrator M, 14 coupled to the opposite ends of the fingers. While it is not clear if the fingers of Erickson has the claimed shape there appears to be no unobviousness to shape the fingers as desired to best conform to the shape of a person's head. Rabin teaches an equivalent head massaging device with fingers that are a little longer such that they curve inwardly at the ends to have the claimed shape. It would have been obvious to one of ordinary skill in the art to modify Erickson to shape the fingers to be a little longer as taught by Rabin so as to cover more of the head and massage more area.

**Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 32 above, and further in view of Rowe.** It would have been obvious to one of ordinary skill in the art to further modify Erickson to include a spherical end to the fingers as taught by Rowe to prevent injury to the skin and to allow smooth movement of the fingers over the skin.

***Response to Arguments***

Applicant's arguments filed 9 April 2004 have been fully considered but they are not persuasive.

Applicant argues that Rabin fails to disclose a device in which an electric vibrator is coupled to the ends of the fingers to transmit vibrations from one end to the other of the fingers. Rabin teaches a plurality of resilient fingers 12, 30, 32. All of the fingers originate from a central base area at the top of the device. The central base area includes a housing containing the vibrator. The vibrator sends out vibrations that would be transmitted down the fingers to the free ends of the fingers. The intent and purpose of the vibrator is to send vibrations throughout the whole device. The structural details and differences of Rabin's fingers are immaterial to the teaching that Rabin provides. The overall function of Rabin is to provide a plurality of fingers to cover the scalp of the patient and provide a vibrator to transmit vibrations throughout all of the fingers just as applicant's device.

Moreover, the structural differences between Rabin and Robbins are immaterial because the structure and fingers of Robbins is not being modified. All of the structural details of the handle and fingers are taught by Robbins. The only difference is just the provision of a vibrator to enhance the massaging action as taught by Rabin. There is no special structural considerations or unexpected consequences in the claimed invention other than just the broad inclusion of a vibrator. Anyone of ordinary skill in the art adding a vibrator to Robbins would place it in the handle which is where the end of the fingers are located. No special structural modification required. In fact, Robbins already teaches an electrical component to the device is provided in the handle. The mere provision of including a vibrator to the device of Robbins appears to be well within the realm of the artisan of ordinary skill.

The same would apply to Blachly. Blachly teaches a scalp massager with fingers 24 including a vibrator to send vibrations to the free ends of the fingers. The structural differences

between Blachly and the instant invention are immaterial. Blachly is merely cited to teach the overall concept of providing a scalp massage in combination with a vibrator. Again the structure of Robbins does not need to be modified. It is fine the way it is. Just providing the broad recitation of a vibrator is not new and therefore obvious. Anyone of ordinary skill in the art could figure it out.

Claims 7, 15, 26 and 30 have the same limitations and therefore the same issues as noted above.

Regarding claims 15 and 30, the transversely extending portion claimed is merely a change in shape which is comprehended by Robbins because Robbins teaches that the shape of the fingers can be modified as desired. There is no unobviousness to any one shape to the fingers.

Regarding the arguments of Rabin and the 102(b) rejection, applicant argues that Rabin fails to disclose fingers having a free end and an opposite end. It is not clear how applicant can disregard the teaching of Rabin. Rabin teaches a plurality of fingers 12, 30, 32 that have free ends. They terminate in an end. The opposite end near the base area of housing 20 is attached the vibrator. While the fingers of Rabin do not look like the fingers of the instant invention they would appear to be comprehended by the claim language. The claims merely recite a resilient finger with a free end and an opposite end. The strips of metal 12, 30, 32 of Rabin would appear to comprehend "fingers" and since they terminate in a free end they would appear to comprehend having free ends. It is not clear how the fingers of Rabin are not fingers.

Figure 8 of Rabin shows how the opening at the free ends of the fingers forms a circumference smaller than a circumference of the head and a head-receiving space extending between the free ends and the opposite ends of the fingers.

Regarding Taylor, applicant argues that Taylor fails to teach the fingers having a free end and an opposite end with the opening defined by the free end being smaller than the head receiving space between the opposite ends of the fingers. The fingers 16, 16' have free ends 17, 17' forming an opening smaller than the head receiving opening between the opposite ends 40, 40'. At least one vibrator 14 is taught coupled to the opposite ends of the fingers. While the device of Taylor appears different from the disclosed invention the claims do not appear to define over Taylor's device.

Regarding Erickson in view of Rabin, applicant argues that Erickson and Rabin fails to teach a head receiving space between the fingers and the opening formed at the free ends of the finger being smaller. The fingers of Erickson form a head receiving space as does Rabin. The fingers of Erickson would only cover the top portion of the head while the fingers of Rabin would cover more of the head. Again the only thing Erickson lacks is the shape of the fingers. There appears to be no unobviousness to shape the fingers as desired including being able to cover more of the head as taught by Rabin. It would have been obvious to one of ordinary skill in the art to modify Erickson to shape the fingers to cover more of the head as taught by Rabin that would include an opening at the free end of the fingers being smaller than the head receiving space as shown in figure 8 of Rabin.

Regarding claim 33, the shape of the ends of the fingers would have to be protected in order to fit over the scalp of the user without cutting into the scalp. If the ends were sharp they

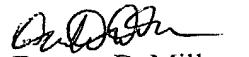
would cut into the scalp of the user therefore the ends have to be protected. Making them rounded or spherical would be well within the realm of the artisan of ordinary skill. Rowe would appear to suggest this.

*Conclusion*

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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